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IN THE

Supreme Court of the United States

October Term, 1968.

No. 1020.

JARKA CORPORATION,

Petitioner,

v.

MITSUI SEMPAKU K. K.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

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COUNTER-STATEMENT OF THE CASE.

References herein are to the Appellant's Appendix (a) in the Court of Appeals; to the appendix to the Petition (app) here; and to the Petition (Pet).

Plaintiff, a longshoreman, was injured on August 2, 1961, on board the vessel, M/S MATSUDOSAN MARU, while engaged in discharging a cargo of sugar from the vessel. Plaintiff was employed by Petitioner, a stevedore, as were the other members of the longshoremen's gang similarly engaged.

It is usual for sugar to remain on the sides of sugar vessels between the ribs of the ship and it is always necessary for this sugar to be scraped from the sides of the vessel by means of sugar scrapers (112a). It was Plaintiff's particular job to scrape this sugar from between the ribs. While doing so he was struck on the head by a sugar scraper being used by a fellow employee, who was working three or four feet away from the Plaintiff, and who was also scraping the sugar from the sides of the vessel. The worker had been supplied with a scraper which was dull and of which he complained to his foreman (42a); his foreman did not thereafter supply him with a sharper scraper (47a et seq.). The scraper provided was not as sharp as the scraper exhibited at the trial by the stevedore (70a). The stevedore never sharpened the scrapers (97a-104a) although they got duller by use (105a). The scraper which had been provided was also shorter than the sugar scraper exhibited by the stevedore (47a), there being a difference of one foot in length (1b-2b). Had the scraper been longer the accident may not have occurred (47a). The evidence also shows that the scraper provided was not inspected by either the hatch boss (68a), nor by the stevedore's ship boss (106a), who was in complete charge of the operation being performed by the stevedore (106a and 116a et seq.), in order

to assure its safe condition as required by the Safety & Health Regulations for Longshoring, Section 9.61 (3b).

It was known to the employees of Petitioner that the sugar which was to be scraped was hard sugar, and this fact was known to them from the time they began the scraping at 8:30 A. M. until the accident occurred at approximately 10:30 A. M. (52a, 55a). It was also known to the men that the sugar was hard all the way around the ship and not just at the spot where the accident occurred (51a and 55a). This hardness of sugar was not unusual but had been experienced on prior occasions in a like state (30a, 31a, 43a). As a matter of fact, the evidence indicated very definitely there was nothing unusual about the stowage on this ship (30a-31a) which was corroborated by stevedore's witness, the ship boss, when he testified there was nothing different about the stow of this ship when it was turned over to him for discharge than all other sugar ships (113a).

The Plaintiff and his fellow-workers who were engaged in scraping the sugar from the ribs of the ship were obliged to stand at a level which was too low to permit them to properly scrape the sugar from the ribs of the ship thereby requiring the workman to stand on his toes, holding the very end of the scraper with both hands, which he was doing at the time he lost control of the scraper and struck Plaintiff on the head (17a, 47a). It was brought out very clearly by the stevedore in its cross-examination of Plaintiff that there was nothing wrong with the way the sugar was stowed (59a, 60a, 62a) but that through the fault of the stevedore's hatch boss, too much sugar had been taken out of the hatch by the stevedore which required the men to work from a level which was too low for the scraping operation (59a, 62a). The stevedore's witness, who was in complete charge of the operation (106a, 116a, 117a), gave further evidence that the men should be permitted to do

the scraping operation by standing on the sugar in a natural position and should not have to reach up (110a, 111a); he further testified that if the sugar was not at the right level and was down too low, preventing the men from performing the scraping operation by standing at man-height, "That would be wrong" (11a, 112a).

It was a further fact that the stevedore-foreman did not provide hard, protective hats for the men (68a) although they were working closer together than usual, with not enough space to work safely (54a, 55a). The stevedore's medical witness testified that had Plaintiff been supplied a hard hat, the injury might have been prevented (71a et seq.).

During the time of this scraping operation no officers or members of the crew of the vessel were in the hold where the men were working (34a). All fact witnesses were employees of Petitioner.

At the conclusion of the testimony at the trial, the Court charged the jury on the issues pertaining to the case of the Plaintiff against the vessel owner. After the jury rendered a verdict in favor of Plaintiff, the Court in a supplementary Charge, instructed the jury as to the respective rights and liabilities of the ship owner and stevedore. The jury then found for the vessel owner and the Court entered judgment accordingly.

The Court of Appeals affirmed.

REASONS FOR DENYING THE WRIT.

1. There Is No Conflict in the Law Governing Liability of Petitioner to Respondent.

Petitioner maintained in the court below and in its petition (4 Pet) "that the longshoreman's injury was due fundamentally to the unsafe condition of portions of the ship's stow" and theorizes that the unseaworthy condition either precluded the shipowner from recovering from the stevedore or, in the alternative, required it to share the loss proportionately with the stevedore. This theory is not tenable.

Beginning with *Ryan Stevedoring Co., Inc. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124, this court has held that an unseaworthy stow does not prevent a recovery by the shipowner against the stevedore where the stevedore's breach of warranty of workmanlike service brought about injury to the plaintiff.

Since *Ryan* this court has consistently held that where the stevedore does no more than bring into play the unseaworthy condition of the vessel, it is, nevertheless, liable to the vessel owner. In *Crumady v. J. H. Fisser*, 358 U. S. 423 and *Italia Soc. v. Oregon Stevedoring Co.*, 376 U. S. 315, this Court reviewed many of the applicable cases and definitely resolved any conflict which may have existed theretofore.

The Court of Appeals, when considering Petitioner's argument[1] that an unseaworthy condition of the vessel

1. "Mr. Griffin: I take exception to that portion of Your Honor's charge where you said that—in your Fact 3 situation where you said in effect there are two causes. One, the unseaworthiness of the ship with the breach of workmanlike duty, and then I believe Your Honor said that in that circumstance if the breach of duty by the stevedore is one of the proximate causes that the ship can get indemnity, and I would say on the other side that if the ship's act of unseaworthiness is one of proximate causes they can't." (181a-182a)

precluded recovery against the stevedore, relied upon decisions of this Court, and said:

> "The stevedoring company maintains that the jury could have concluded that the conduct of the shipowner in turning over to the stevedoring company a ship with caked sugar on its bulkheads was the basic or real cause of plaintiff-longshoreman's injury, even though that same body might have found that the stevedoring company's conduct was a substantial factor in causing injury. If the jury came to these conclusions, the argument runs, it had no alternative but to find for the stevedoring company on the issue of indemnity, and the jury should have been so instructed. The trial judge did not misapply the substantive law of indemnity in refusing to charge in this vein. See *Crumady v. The J. F. Fisser*, 358 U. S. 423, 428-429 (1959); Italia Soc. v. Oregon Stevedoring Co., 376 U. S. 315, 320-321 (1964); Johnson v. Sword Line, Inc., 257 F. 2d 541, 545 (C. A. 3, 1958)." (3 app)

After reviewing evidence bearing upon the shipowner's liability to the injured longshoreman, the Court of Appeals concluded that the shipowner's liability stemmed only from the conduct of the stevedoring company:

> "This liability stemmed only from the conduct of the stevedoring company. Even if the jury found that the caked sugar made the ship unseaworthy, this condition could not have injured the plaintiff-longshoreman unless it was brought into play or acted upon by the longshoremen." (5 app)

The Court then concluded as a matter of law that:

> "The shipowner is not deprived of its right of indemnity by the fact that there may have been an im-

proper stow. See Italia Soc. v. Oregon Stevedoring Co., supra, 376 U. S. 315, 323; D/S Ove Skou v. Herbert, 365 F. 2d 341, 348-350 (C. A. 5, 1966)." (7 app)

Thus the Court of Appeals applied the rules of law prescribed by this Court which are clear and unequivocal, and correctly affirmed the judgment in favor of the shipowner. The cases relied upon by Petitioner are not conflicting but have followed the decisions of this Court.[2]

2. There Is No Contribution Between a Vessel Owner and a Stevedore for Injuries Sustained by a Longshoreman.

Petitioner argues that the existing law which imposes liability upon a stevedore for breach of its warranty of workmanlike service is inequitable where the vessel was unseaworthy. He urges upon this court the theory that in such circumstances the stevedore and the vessel should

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2. The two cases relied upon by Petitioner to support his allegation of conflict in the Courts do not, in fact, conflict with one another or with the decisions of this court.

The situation in *Southern Stevedoring & Contracting Co. v. Hellenic Lines, Ltd.,* 388 F. 2d 267 (1968) was analogous to this case in that the shipowner was permitted recovery from the stevedore where the stevedore brought into play an unseaworthy condition of the vessel, thereby producing the accident. Relying upon the rule in *Crumady v. J. H. Fisser,* the Court found that the unseaworthy condition of the vessel was not sufficient to preclude indemnity where the stevedore brought into play the unseaworthy condition of the vessel. (p. 272)

The other case relied upon by Petitioner, *Mortensen v. A/S Glittre,* 348 F. 2d 383 (1965), likewise involved a recovery by a shipowner and the court there, likewise, followed the decisions of this court and raised no conflict. In affirming a verdict directed by the trial court in favor of the shipowner the Court of Appeals said:

> "It is well established that the mere creation of the unsafe condition is insufficient to preclude recovery over where the contractor's own negligence has brought the unseaworthiness of the vessel into play. E.g., Crumady v. J. H. Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d, 413 (1959)." 348 F. 2d 383, 385

We find no conflict in decided cases where a stevedore brought into play an unseaworthy condition of the vessel thereby causing the injury.

share liability to the injured longshoreman. The fallacy in this theory is obvious—the Petitioner erroneously regards the shipowner and stevedore as joint tort-feasors—and in so arguing is asking the Court to apply to the shipowner-stevedore relationship principles applicable to joint tort-feasors. This argument was first urged upon this Court unsuccessfully in *Halcyon Lines v. Haenn Ship Corp.*, 342 U. S. 282.

It has been consistently held since *Halcyon* that the shipowner and the stevedore are not joint tort-feasors and that tort principles are not applicable to their relationship. Recovery in contribution is imposed by law and is measured by the relative fault of the joint tort-feasors or shared equally between them, whereas recovery in indemnity for breach of the stevedore's warranty is based upon an agreement between the shipowner and the stevedore, and is not affected by the shipowner's negligence whether active or passive, primary or secondary. *Weyerhauser S. S. Co. v. Nacirema Co.*, 355 U. S. 503, 569; *Italia Soc. v. Oregon Stevedoring Co.*, 376 U. S. 315, 321; *Dziedzina v. Dolphin Tanker Corp.*, 361 F. 2d 120 (C. A. 3, 1966).

Petitioner's argument that inequity flows from application of the rules prescribed by this Court were dealt with fully in *Ryan, supra.*

The shipowner's liability to the injured longshoreman is determined by tort principles, whereas the stevedore's liability to the shipowner for a breach of warranty of workmanlike service, is determined by principles applicable to contractual indemnity. The two theories are wholly distinct and produce disparate results.

This Court only recently has reaffirmed its position that the shipowner is entitled to recover in full from the stevedore even though it may have failed to supply a vessel free of defects:

"Where the shipowner is liable to the employees of the stevedore company as well as its employees for failing to supply a vessel and equipment free of defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations." *Italia Soc., supra,* 376 U. S. 315, 324.

* * *

"Although in *Ryan* the stevedore was negligent, he was not found liable for negligence as such but because he failed to perform safely, a basis for liability including negligent and nonnegligent conduct alike.

"Subsequent decisions have made clear that the stevedore's obligation to perform with reasonable safety extends not only to the stowage and handling of cargo but also to the use of equipment incidental thereto, *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.,* 355 U. S. 563, including defective equipment supplied by the shipowner, *Crumady v. The J. H. Fisser, supra,* cf. *Waterman S. S. Corp. v. Dugan & McNamara, Inc.,* 364 U. S. 421, and that the shipowner's negligence is not fatal to recovery against the stevedore." *Italia Soc., supra,* 376 U. S. 315, 319.

The Court of Appeals referring to stevedore's theory that damages should be apportioned between shipowner and stevedore, said:

"This objection brings into bold relief the stevedoring company's main difficulty in this case. The law of indemnity is not concerned with the comparison or degree of fault of the shipowner and the stevedoring company. The trial judge explained to the jury several times that if they found that the stevedoring

company had performed its contract in a workmanlike manner the shipowner had no right to recover against the stevedoring company. He informed them in substance that the shipowner could not recover unless the conduct of the stevedoring company amounted to a breach of warranty of workmanlike service. He also told them that the right of indemnity could be defeated if they found that there had been inducement or participation on the part of the shipowner. In so charging the Trial Judge committed no error requiring a new trial." (8 app)

Petitioner's theory of comparative fault has no basis in law (he cited no cases in support of it) and is contrary to the decisions of this Court.

3. Recovery by the Shipowner Against the Stevedore Is Not Barred by Provisions of the Longshoremen's and Harborworkers' Compensation Act. (33 U. S. C. A. 901 et seq.)

Petitioner's complaint that it is not liable to shipowner by reason of the Longshoremen's & Harborworkers' Compensation Act was fully resolved in *Ryan v. Pan-Atlantic Corp., supra,* 350 U. S. 124, 131. The arguments now advanced by Petitioner were all urged upon this Court in *Ryan* and considered, but the Court concluded that the Act was not a bar to recovery.

"While the Compensation Act protects a stevedoring contractor from action brought against it by its employee on account of the contractor's tortious conduct causing injury to the employee, the contractor has no logical ground for relief from the full consequences of its independent contractual obligation, voluntarily assumed to the shipowner, to load the cargo properly." *Ryan, supra,* 350 U. S. 124, 131.

Petitioner has constantly disregarded this Court's decisions that liability of a stevedore to a shipowner is determined by a breach of warranty which arises out of a contractual obligation and not out of a tort-feasor relationship.

4. The Shipowner Defended in Good Faith.

Petitioner argues that it was deprived of a jury trial because the Trial Court refused to submit to the jury an issue pertaining to the shipowner's good faith defense of the case.

The Court of Appeals considered and disposed of that argument, saying:

> "The stevedoring company complains of the Court's denial of its motion to file a supplemental pleading so as to allege, as a defense to the indemnity claim, that the shipowner was not acting in good faith, and its refusal thereafter to grant it a continuance. We are satisfied that these motions were within the trial judge's discretion and were properly denied." (9 app)

That conclusion of the Court of Appeals was firmly supported by the opinion of the Trial Judge who stated that he had canvassed the evidence and had found no basis for stevedore's allegation of bad faith on the part of the shipowner. The Trial Court said:

> "Counsel for Jarka contends that the shipowner violated its procedural duty as an indemnitor to the indemnitee. I have canvassed the evidence adduced by the stevedore and cannot agree with its contentions. I find that the pre-trial memorandum, filed on behalf of the ship, gave adequate notice to Jarka as to what defenses it should have been prepared to make, and what evidence it should have been prepared to refute.

> Nor do I accept the stevedore's arguments that the ship abandoned its defense of the action. The ship's position at trial, that the stevedore's actions were the cause of its unseaworthiness, was consistent with its posture before trial: consequently the stevedore was not prejudiced thereby." (19 app)

It is a fundamental principle of law that it is the function of the Court to determine whether or not there is sufficient evidence to raise a question of fact. In this case the Court found no evidence to support Petitioner's allegation of bad faith and, therefore, there was no issue of fact to go to the jury and Petitioner's allegation is without merit.

CONCLUSION.

For the foregoing reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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